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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF

ADRIAN RISKIN, Petitioner, vs. HOLLYWOOD MEDIA DISTRICT PROPERTY OWNERS ASSOCIATION, Respondent.	CASE NO. BS 166075 (Hon. Mary H. Strobel, Dept. 82) RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION FOR AWARD OF ATTORNEY'S FEES AND BILL OF COSTS; SUPPORTING DECLARATION OF JEFFREY BRIGGS Date: July 17, 2018 Time: 9:30 am Dept: 82

Respondent Hollywood Media District Property Owners Association ("Respondent") respectfully submits this opposition to Petitioner Adrian Riskin's ("Petitioner") Motion for Attorney's fees and Memorandum of Costs (which the parties stipulated could be heard concurrently, and collectively here "Motion").

I

SUMMARY OF ARGUMENT OPPOSING MOTION

Respondent argued from the outset that Petitioner's efforts in this case were part and parcel of his attempt to use the Public Records Act to put the Hollywood Media Business Improvement District out of business by dint of overwhelming time and expense. His application for attorney fees proves the point: He seeks 78% of his alleged attorneys' fees and all of his costs—*just shy of $49,000 in total*—for having obtained only a handful of records as a result *not* of the additional search he sought and was denied, but of denied exemptions that *were never even a part of the reason his Petition was filed* and as to which he made no effort to resolve without litigation.

The Court should exercise its discretion to deny Petitioner "prevailing party" status and reject the fee application and cost bill *in toto*, or at most should apportion the requested fees in relation to the very limited success obtained (and not even sought in the Petition). Any other result would condone Petitioner's weaponization of the PRA despite Respondent's victory on the gravamen of the Petition and give Petitioner a victory enormously disproportionate to his asserted goal but completely in line with his *real* goal of destroying Respondent.

II

PETITIONER OBTAINED NOTHING SOUGHT IN HIS ORIGINAL PETITION

The Petition sought "a peremptory writ of mandate, without hearing or further notice, immediately directing Respondent to immediately [sic] conduct a diligent and comprehensive search for the requested records and to thereafter promptly provide Petitioner the requested records," and "an order declaring that Respondent has violated the CPRA by its refusal to release the public records sought by Petitioner's requests, and by its failure to properly respond to, and assist with, Petitioner's response." (Petition, Docket Ref. 11/14/2016, at p.9, pars. 1 and

3.)[1]

The entire premise of the Petition, and of Petitioner's supporting argument at trial even after Respondent voluntarily did a second search that yielded a handful of duplicate records immediately produced,[2] was that Respondent in fact was hiding numerous records or had failed to do an adequate search on either occasion. Petitioner contended simply that "*there must be more."* This fundamental premise of Petitioner's action was rejected by the Court's finding that "*Petitioner has not proven that Respondent's search was inadequate.*" In this respect—the gravamen of the Petition—Petitioner is not the prevailing party and thus is entitled to no fees or costs.

III

THE FEW EXEMPTION CLAIMS REJECTED BY THE COURT WERE NOT CHALLENGED BY THE PETITION AND DID NOT REQUIRE LITIGATION

Respondent's original production of records in response to Petitioner's PRA request noted several claimed exemptions, including the attorney-client privilege exemptions ultimately sustained by the Court and the "draft' exemptions ultimately rejected. (Petition Ex. I, Docket Ref. 11/14/2016) *Not a single communication from Petitioner or his counsel prior to commencement of this action questioned any such exemptions.* Nor were any exemption claims questioned in the Petition. Prior to the Petition and in the Petition itself, Petitioner's sole contention was that Respondent did not perform an adequate search, that there had to be more. As already noted, the Court found that Petitioner failed to establish that any search conducted by Respondent was inadequate.

Only in the final phase of the trial did Petitioner challenge Respondent's claimed exemptions. Respondent's claimed exemptions on the basis of attorney-client communication/work product and privacy were upheld (the latter were

[1] The other requests for relief were for the statutory briefing schedule and attorney fees.
[2] These were paper duplicates of a few records previously produced electronically.

provided as redacted). Respondent's draft and deliberative process exemption claims as to some 18 records (most of which were primarily drafts of agendas) were denied—and Petitioner reported that some such records had in fact previously been produced in any event. But Respondent effectively abandoned the draft and deliberative process exemption claims and promptly provided the records even in the absence of an actual writ requiring it to do so. Had the exemptions been challenged previously by Petitioner, outside of and apart from the action claiming the searches were inadequate, Respondent clearly would have provided all but the privileged records either as a means of avoiding litigation altogether or so as to avoid time and expense on that issue in court.[3] Only the claimed privileges would have been at issue—and Respondent prevailed on those exemption claims. (Briggs Decl., par. 6)

In short, the only records Petitioner obtained in the final result of his action were a handful of draft agendas and related notes as to which Respondent would have abandoned its exemption claims—as it ultimately did—had Petitioner questioned those exemptions earlier or informally. Petitioner chose not to seek the path of least resistance—and of least cost—as to the few additional records he did obtain. As discussed below, therefore, he is not the prevailing party and certainly is not entitled to fees and costs he could have avoided by an earlier informal challenge to Respondent's original exemption claims.

IV

THE COURT HAS DISCRETION TO DENY PETITIONER FEES BECAUSE THE FEW RECORDS OBTAINED WERE NOT THE SUBJECT OF AND DID NOT REQUIRE HIS PETITION, AND WERE MINIMAL AND INSIGNIFICANT IN RELATION TO WHAT HE SOUGHT AND WAS DENIED

The PRA provides that courts "shall award court costs and *reasonable*

[3] Importantly here, Respondent knew it had almost no chance of securing its own fees in the event of victory, given the stringent "clearly frivolous" standard applicable to such a claim by Respondent under Section 6259(d). It had nothing to gain by litigating over exemptions as to drafts and other inconsequential records.

attorney fees to the plaintiff should the plaintiff prevail in litigation" under the Act. Cal. Gov. Code §6259(d)(emphasis added). But courts have discretion to decide "what it means to 'prevail in litigation'," and what constitutes "reasonable" fees. Belth v. Garamendi, 283 Cal.Rptr. 829, 232 Cal App 3d 896, 901 (1991).

In both Rogers v. Superior Court, 23 Cal.Rptr.2d 412, 19 Cal App.4th 469 (1993), and Motorola Communication & Electronics, Inc v. Department of General Services, 64 Cal.Rptr.2d 477, 55 Cal App.4th 1340 (1997), fees were denied where records were produced after the litigation commenced but not as a *direct result* of that litigation. Furthermore, in Los Angeles Times v. Alameda Corridor Transp. Auth., 88 Cal.App.4th 1381, 1391- 1392 (2001), the court said a PRA plaintiff could obtain documents "that are so minimal or insignificant as to justify a finding that the plaintiff did not prevail."[4]

Here, the evidence is that exemptions were asserted prior to the Petition but never questioned or challenged by Petitioner prior to or in his Petition. When Petitioner did first question the exemptions late in the litigation, it was not preceded by any informal request to Respondent for further explanation of the exemptions or any effort to resolve those issues without court intervention. Respondent was required to log and support its claimed exemptions, did so successfully with respect to its attorney-client and privacy privileges, and logged but did not contest the draft and deliberative process exemptions. The Petition did not directly result in the production of exempt records, because if those exemptions had been challenged outside the litigation, as they could have been both before and during the litigation, there would have been no court involvement in that issue at all. (Briggs Decl., Par. 6; *see also* note 3, *supra*.)

In addition, the exempt records ultimately produced were, indeed, "minimal" as compared to the extent of the further search for additional records Petitioner

[4] That court did, however, award fees to the plaintiff as a result of its successful challenge to claimed exemptions, the gravamen of that petition.

unsuccessfully sought to compel. Petitioner argued that he had obtained many requested emails from third party recipients and senders, and that it was implausible that respondent still had so few of them. They also were "insignificant"—Petitioner noted that some already had been provided, and the Court will recall that Petitioner's main quest was for communications that would support his claim that Respondent's Executive Director had violated ethical rules as a former City employee, which he contended Respondent was trying to hide, yet not a single exempt record ultimately produced had anything to do with such allegations.[5]

Because the only records Petitioner obtained were not in fact the direct result of the litigation, and were few and insignificant in the context of what Petitioner really sought, the Court should exercise its discretion to conclude that Petitioner was not the prevailing party and deny Petitioner any fees and costs.

V

EVEN IF PETITIONER "PREVAILED" IN A LIMITED SENSE, ANY FEE AWARD SHOULD SIMILARLY BE LIMITED

While any award of attorney fees is not required to be commensurate with or in proportion to the degree of arguable "success" in PRA litigation, "the degree of the plaintiff's success in obtaining the objectives of the litigation is a factor that the trial court may consider in determining an award of reasonable attorney fees under . . . the CPRA fee statute." Bernardi v. County of Monterey, supra, 167 Cal.App.4th 1379, 1398, 84 Cal.Rptr.3d 754, 769 (2008)(rejecting a "limited success" challenge to a substantial fee award where many claimed exemptions were upheld but thousands of pages of additional records were produced and the public agency was ordered to search records held by a third party). The Bernardi court further

[5] Respondent argued in its trial brief that Petitioner's deposition of Respondent's Executive Director went astray of PRA compliance issues and sought direct evidence of such alleged ethical violations—and the deposition is part of the discovery effort for which Petitioner does *not* seek fees. This further supports the insignificance of the draft agendas and the like ultimately produced.

observed that

> "California courts have long held that trial courts have broad discretion in determining the amount of a reasonable attorney's fee award. This determination is necessarily ad hoc and must be resolved on the particular circumstances of each case." In exercising its discretion, the trial court may accordingly "consider all of the facts and the entire procedural history of the case in setting the amount of a reasonable attorney's fee award."

Id., 167 Cal.App.4th at1394, 84 Cal.Rptr.3d at 766 [citations omitted].

Here, Petitioner himself acknowledges that fees should be apportioned relative to any "success" achieved because he has reduced his fee request with respect to all written and oral discovery efforts directed to his unsuccessful request for a new search. Petitioner's Motion at p. 4, lines 10-15. Astonishingly, however, this represents a mere 20% reduction in his total fee even though he cannot deny that said "new search" was the entire basis of his Petition, that he never raised the exemption challenge until the very end of the litigation, and that he never tried to resolve any of the exemption claims without court intervention. Indeed, such court intervention proved to be necessary only with respect to privilege and privacy exemptions *that were upheld*. Petitioner offers no argument to the contrary in his fee motion, yet still seeks the lion's share of his fees.

If the Court finds that Petitioner "prevailed" in any respect worthy of fees at all, the award should be apportioned to considerably less than the 80% Petitioner seeks. The exemption issue was not raised in the Petition itself, nor in other than a very general allusion in Petitioner's Opening Brief's request for relief, and scarcely if at all during trial. Inasmuch as Petitioner was not successful in obtaining the relief sought in the Petition or any of the principal relief argued even through the trial, no fees should be awarded for those efforts—according to Petitioner's counsel's time records, this would reduce the fees requested not just by the 20% he

attributes to unnecessary discovery, but by an additional 48% for all other work through the first mention of "exemptions" on 12/8/17 (some 43.9 hours in addition to the 19.1 discovery hours he already discounts). Thereafter, Petitioner's efforts still substantially concerned his unsuccessful contention that Respondent had failed to perform an adequate search; it would be generous to grant Petitioner even half of his counsel's remaining time, or 13.55 of the 27.1 remaining total hours, as being attributable to the exemption issue. Moreover, Petitioner prevailed on only half the total claimed exemptions! Thus, a *generous* apportionment of fees to the limited success achieved on the exemption issue would be some 10 hours or 11% of the 90.1 total hours—far less than the 71.6 or 78% Petitioner seeks. Even if the Court concludes that the exemption issue only arose because of a Petition originally addressed to other claims—a conclusion at odds with the evidence that Petitioner never questioned Respondent's exemptions prior to the Petition or attempted at any time to resolve them without court intervention—certainly no more than another few hours reasonably could be apportioned in Petitioner's favor.

Respondent also contends that Petitioner's counsel's hourly rate claim is unsupported and high. Respondent's counsel's hourly rate for this case is $350, barely half of Petitioner's counsel's request for $650/hour, and yet Respondent's counsel's 37 years of experience is far more than twice the 14 years of Petitioner's counsel (Briggs Decl., pars. 5 and 3)—it makes one wonder who is the real "public interest" lawyer in this case. Furthermore, the PRA legal issues in this case were not complex, and as already noted, the exemption issues would have been resolved without court intervention if Petitioner ever had made an attempt to do so. Petitioner claims no great public interest achievement, has made no new law with respect to PRA issues, and to compare his counsel's efforts in this case to the civil rights cases cited in the allegedly hourly rate supporting declaration of Ms. Sobel—*who claims no knowledge whatsoever of what this particular case did and did not involve*—is worthy of note only for its chutzpah. No further comment on that

comparison is necessary to support its rejection.

This was Respondent's counsel's first litigation under the PRA, and he has been advising Business Improvement Districts on PRA issues only for some four years. (Briggs Decl., par. 1) His client prevailed on the principal issue in this action. If Petitioner's more experienced PRA counsel is entitled to any fees at all for obtaining minimal and insignificant relief on a tangential issue raised at the end of the action without an attempt to resolve that issue informally, Respondent submits that her hourly rate cannot reasonably be set higher than Respondent's counsel's $350.

VI

IF PETITIONER IS ENTITLED TO ANY RCOVERABLE COURT COSTS, THE DEPOSITION EXPENSE HE AGREES WAS NOT INCURRED FOR A SUCCESSFUL PURPOSE MUST BE DEDUCTED

The parties stipulated that Respondent's Motion to Tax Costs could, for convenience of counsel and the Court, be raised in conjunction with this opposition to Petitioner's fee application. (Docket Ref. 04/03/2018) For the reasons stated above as to the "prevailing party," Respondent contends that Petitioner is entitled to no costs, or alternatively that the costs asserted in Petitioner's Memorandum of Costs (Docket Ref. 03/16/2018) should be apportioned in the same manner as any fee award to Petitioner. In the latter case, however, Petitioner cannot be awarded the $323.75 for "Deposition costs" listed in his cost bill because in his fee motion—admittedly filed after the cost bill—he expressly disclaims any entitlement to discovery and deposition expenses on the grounds they were incurred in connection with his unsuccessful effort to require Respondent to perform another search. He obviously cannot disclaim one and yet claim the other.[6]

[6] Respondent presumes Petitioner will not contest that deduction, as it was included before his fee motion decision to not seek deposition fees was made.

VII

CONCLUSION

Petitioner is no "transparency in government" champion; his website makes clear he is a bully whose principal purpose is not to obtain and publish Business Improvement District records, but to use the Public Records Act to cost the districts time and money in an admitted effort to put them out of business. Samples of Petitioner's vicious screeds against BID executives and other BID participants were submitted with Respondent's Opposition Trial Brief (Docket Ref. 10/27/2017); though deemed irrelevant at that time, they certainly are relevant to Petitioner's fee request for 78% of his counsel's fees at an exorbitant hourly rate for a 99% losing effort. Awarding this Petitioner any fees, let alone non-reasonably apportioned fees at an hourly rate that should make a true "public interest" lawyer blush, would give Petitioner what he actually wanted in the first place—a way to cost Respondent substantial money, in the form of its own fees and costs and, he hoped, his own.

To further prove Petitioner's true intent, one need only read the following quote from his website about his use of the PRA:

> And finally, it turns out that ~~my victims~~ the objects of my attention, both BIDs and City, have become a whole lot more stubborn about handing over the goods . . . .

(Briggs Decl., par. 2, Ex A)(deletion in original).

Respondent urges this Court not to perpetuate his victimization of at least this Respondent BID by rewarding his weaponization of the California Public Records Act. His fee application and cost bill should be denied, or alternatively severely reduced in proportion to the reasonable measure of his very limited "success" in the action.

Respectfully submitted,

Dated: June 14, 2018

JEFFREY C. BRIGGS
BRIGGS LAW OFFICE

/s/
Jeffrey C. Briggs
Attorney for Respondent Hollywood Media District Property Owners Association

DECLARATION OF JEFFREY C. BRIGGS

1. I am an attorney duly licensed to practice in California since 1981 and I am counsel for Respondent in this matter. I have served as counsel for Respondent in connection with responding to Public Record Act requests and similar matters since early 2015. I represent or have represented some 14 other Business Improvement Districts in regard to Petitioner's hundreds of Public Records requests since 2014. These entities often are very small, have few if any employees (several are entirely volunteer), and very tight budgets. They are funded by a self-imposed tax assessment on district property owners, are privately operated, do not use public money, and are very different from the "public agencies" to which the Public Records Act usually is applied.

2. Exhibit A attached hereto is a true copy of the first page of an article from Petitioner's website describing recipients of his PRA requests as his "victims." Petitioner has testified in another case that he is the author of this article, "Mike," and indeed of all articles on his website regardless of pseudonym.

3. I am a 1981 cum laude graduate of the University of Minnesota Law School, where I was a member of the Law Review and did legal clinic work for state prisoners. I passed the California Bar in the fall of 1981, and began practicing business litigation as an associate at Gibson Dunn & Crutcher in Los Angeles. I was made partner in 1989, and for two years was the firm's youngest partner. I had tried nearly twenty cases to state and federal juries, judges, and arbitration tribunals by the time I left that firm in 1996 to become a partner at what was then known as Alschuler Grossman & Pines (and later Alschuler Grossman Stein & Kahan), also in Los Angeles. I headed that firm's Intellectual Property department and tried several more cases at that firm before leaving in 2007 to practice on my own in Hollywood. I have continued to try cases in my solo practice. I have been ranked as one of "America's Best lawyers" since 2007, and a Southern California "Super Lawyer" since the inception of that designation in 2004.

4. My experience and the quality of my advocacy led to my past-presidencies of the Century City Bar Association and the Association of Business Trial lawyers (Los Angeles), in which positions I have worked closely with state and federal legislators, including with respect to the development of court rules. I am active in Hollywood, where I have served two terms as Chair of the Chamber of Commerce and represent several Business Improvement Districts and other non-profit enterprises in matters of public interest.

5. My usual rate for usual commercial litigation is $500/hour, but I charge Respondent and other public interest and non-profit entities much less: My hourly rate for the present action is $350. This rate also accounts for the fact that, like Petitioner's counsel, I am a solo practitioner without significant associate, paralegal, or even secretarial support to take on tasks at a lesser rate for non-profit and public interest clients.

6. I advised the Court at the two hearings in which exemptions were discussed (first directing they be logged, and second as to the log itself) that Petitioner was willing to withdraw the draft and deliberative process exemptions but for the expected claim by Petitioner that it would entitle him to fees despite his loss on the search request that led to his Petition. I prepared a log without argument as to those exemptions, and the other exemptions were sustained and two documents produced with redactions as to private matters.

I declare under penalty of perjury that the foregoing is true and correct of my personal knowledge, that I am competent to so testify, and that this Declaration is executed this 14th day of June, 2018, at Hollywood, California.

_____/s/_____

Jeffrey C. Briggs

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Briggs Law Office, 6464 Sunset Boulevard, Suite 715, Hollywood, CA 90028. On this 14th day of June, 2018, I served a true copy of the document listed below on the person listed below by way of email pursuant to the parties' agreement for such service, and did not receive a bounce-back rejection of same:

RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION FOR AWARD OF ATTORNEY'S FEES AND BILL OF COSTS; SUPPORTING DECLARATION OF JEFFREY BRIGGS

Colleen Flynn
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I declare that I am a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on this 14th day of June, 2018, at HOLLYWOOD, California.

Jeffrey C. Briggs